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No. 94-

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1994

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IN RE ALEXIA ANDERSON, *ET AL.*,
Petitioners.

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PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT (DONALD RUSSELL, H. EMORY WIDENER, JR., AND ROBERT F. CHAPMAN, CIRCUIT JUDGES)

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## QUESTION PRESENTED

Should this Court issue a writ of mandamus to compel the Court of Appeals to issue a decision in a case that has been pending before that court for more than 32 months after oral argument, where (a) the issues are not complex, (b) the same panel has decided a number of other cases arising out of the same proceeding, and (c) the parties agreed that the appeal required expeditious treatment so that the parties would know their rights and thereby be able to exercise them in an informed manner as part of the claims process out of which this appeal arose?

## PARTIES BELOW

The petitioner Alexia Anderson was the named appellant in the Court of Appeals, and she is a claimant in the Trust operated by the appellee Dalkon Shield Claimants Trust. That trust was established in the reorganization proceeding for A. H. Robins Co., Inc., but Robins is not a party to the proceeding in the Court of Appeals. Petitioner Laura Fisher is also a claimant, but she was not among the original appellants. She was permitted to intervene as an appellant in the Court of Appeals. The other individual appellants/intervenor-appellants, who are also petitioners in this Court, are listed in the Appendix to the Petition at 34a - 38a. Circuit Judges Donald Russell, H. Emory Widener, Jr. and Robert F. Chapman of the United States Court of Appeals for the Fourth Circuit, the judges who sat on the appeal, are respondents in this Court, as is the Dalkon Shield Claimants Trust.

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This petition for a writ of mandamus seeks an order from this Court directing the panel of judges of the United States Court of Appeals for the Fourth Circuit, who heard the appeal in this case more than 32 months ago, to decide the straightforward issues raised by the appeal forthwith.

## OPINIONS BELOW

There is no opinion of the Court of Appeals for the Fourth Circuit. The June 26, 1991, memorandum opinion of the United States District Court for the Eastern District of Virginia, from which the appeals to the Court of Appeals were taken, is set forth in the appendix to the petition at 1a-15a and the amended order of July 1, 1991, based on that opinion is set forth at 16-22a. Neither the memorandum nor the order is reported.

## JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1651(a) and Rule 20.2 of this Court. The District Court had

jurisdiction over the bankruptcy reorganization proceeding on which the appeals are based under 28 U.S.C. § 1334.

## RELEVANT STATUTE

The All Writs Act, 28 U.S. C. § 1651(a), provides as follows:

> "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

## STATEMENT OF THE CASE

This petition arises out of the A.H. Robins Co., Inc. Chapter 11 Reorganization which was filed in the United States District Court for the Eastern District of Virginia in August 1984, and whose confirmation order was finally upheld by this Court in November 1989. That order approved an elaborate Reorganization Plan, under which all of the nearly 200,000 Dalkon Shield claimants first had to file administrative claims with the Trust established under that Plan before they could either go to court or have their claims arbitrated. Only after the Trust made an offer to settle the claim, and the parties met to attempt to resolve their differences, could a claimant go to arbitration or to court.

As part of its continuing jurisdiction over the Plan, the District Court, at the behest of the Trust, issued the July 1, 1991 order from which the appeals were taken to the Fourth Circuit. That order affected nearly every unresolved claim then pending before the Trust and raised two basic sets of issues on appeal that required immediate resolution in order for the claims process to proceed swiftly and fairly.

In the first set are the "certification procedures" approved by the District Court, which allowed the Trust to

deny any claimant access to the judicial remedy that is specifically guaranteed by the Reorganization Plan, simply by refusing to certify to the District Court that the administrative process was concluded. Under the July 1 order, absent such certification, the claimant could not exit the Trust's own dispute resolution process and proceed to a neutral forum.

Also in the first set of issues is the "holdback" provision under which no claimant who won a judgment in court or in arbitration could be paid more from the Trust than the greater of the Trust's final settlement offer, or $10,000, until all the claims had been resolved or the Trust determined that there would be sufficient funds to pay all remaining claimants in full. As to both the certification and the holdback, various objectors argued that the Order was directly at odds with express provisions in the court-approved Reorganization Plan and that it undermined promises made to claimants during the approval process. These issues were raised by petitioners Anderson and others who filed the original appeals.

The second set of issues came into the appeal after the Court of Appeals permitted intervention by claimants Fisher, *et al.*, who challenged the validity of key provisions of the Plan's arbitration rules. Under the Plan, any claimant may elect arbitration in lieu of court adjudication, but the arbitration rules approved by the District Court have extremely unfavorable choice of law and statute of limitations provisions. Because of those provisions, most claimants would be discouraged from electing arbitration, even if they would much prefer to do so, because of these harsh, and, as petitioners argued, unlawful rules. Again, the principal objections were based on alleged inconsistencies between the rules and the Reorganization Plan which had previously been approved by the Court of Appeals.

Immediate resolution of the appeals was essential because the issues dealt with the validity of the ongoing claims process, through which every claimant had to pass. Thus, all parties agreed that the legality of the holdback and

arbitration provisions would have a significant, and in many cases, determinative impact on whether the claimant accepted the offer made by the Trust, and, if not, whether to elect litigation or arbitration. Yet, until the Court of Appeals decides these questions, claimants cannot make informed decisions involving their options under the Plan. Moreover, with respect to the holdback, the Trust had candidly admitted that the aim of this provision was to apply additional pressure on claimants to accept the Trust's offer of settlement, a rationale that the District Court also embraced. That coercive impact, which petitioners contend is itself unlawful, will continue to be achieved until there is a final ruling on the validity of the holdback provision, whether it is lawful or not.

Consistent with the importance of a prompt ruling, the briefing occurred in an expeditious manner in the Court of Appeals, and the case was set for oral argument on March 4, 1992, before the same panel that has heard all of the appeals arising out of the Robins Reorganization: Circuit Judges Donald Russell, H. Emory Widener, Jr., and Robert F. Chapman. Argument was quite spirited, with the entire panel showing an in-depth grasp of the issues presented, doubtless aided by the fact that the same judges had heard all of the more than 40 prior appeals in the Robins reorganization (App. 2a). A total of five briefs were submitted on the two sets of issues, totaling 176 pages. Since the appeals turn almost entirely on the meaning of the Reorganization Plan, which the Fourth Circuit had previously approved, there were no complicated legal or factual issues. The order appealed from was only eight pages long, and the memorandum accompanying it was 18 pages. Much of even those two modest sized documents related to issues not subject to the appeals.

Despite the straightforward nature of the appeals and the obvious need for a prompt ruling, the Court of Appeals has yet to issue an opinion. Frustrated by this delay, petitioners took the extraordinary step of calling the problem

to the Court of Appeals' attention on December 13, 1993, by filing a "Petition for Rehearing With Suggestion for Rehearing *In Banc*," even though the Court had not yet rendered a decision (App. 23a-27a). That filing explained again the need for a prompt resolution, but has been met with total silence from the Court. The only change in circumstances is one of degree: as set forth in the letter from the Trust to the Court, dated September 27, 1994 (App. 28a-29a), the minimum holdback amounts have been elevated on several occasions so that now all judgments of $175,000 or less are paid in full. While that limitation does not have any impact on any person with a current judgment, its validity nonetheless effects those who are trying to decide whether to go to court or accept a settlement amount from the Trust which they otherwise believe is inadequate.

But the most important problem resulting from this judicially-created uncertainty is that claimants still do not know whether the harsh provisions on choice of law and statute of limitations contained in the arbitration rules are valid, and hence many claimants are delaying making a choice, or electing litigation, even though they would prefer arbitration. Even that alternative is becoming unavailable as the Trust is now informing claimants that they must accept the Trust's settlement offer or elect arbitration or litigation by a date certain or forfeit all of their rights to compensation (App. 30a-33a).

## REASONS FOR GRANTING THE WRIT

Pursuant to 28 U.S.C. § 1651(a), "the Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." As this Court observed in *Will v. Calvert Fire Insurance Co.*, 437 U.S. 655, 661-62 (1978), "[t]here can be no doubt that where a district court persistently and without reason refuses to adjudicate a case properly before it, the

court of appeals may issue the writ 'in order that [it] may exercise the jurisdiction of review given by law.' *Insurance Co. v. Comstock*, 16 Wall 258, 270 (1873)." It is true that the right must be "clear and indisputable," *id.* at 662, but where a court refuses to adjudicate a matter before it, a higher court may issue the writ to correct "unauthorized action of the court obstructing the appeal." *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 25 (1943). As this Court explained in *McClellan v. Carland*, 217 U.S. 268, 280 (1910), this Court has "the power to issue the writ of mandamus to compel the circuit courts to proceed to final judgment in order that this court may exercise the jurisdiction of review given by law." Indeed, numerous other decisions of this Court support that proposition. *See, e.g.*, *Roche*, *supra*, 319 U.S. at 26; *Ex Parte Newman*, 81 U.S. (14 Wall.) 152, 165 (1872).

Of course, a writ of mandamus is not to be routinely issued, nor should it displace the ordinary appeal process: "It is not disputed that the remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34 (1980). It is available only when the petitioner has "no other adequate means to obtain the relief he desires," *id.* at 35; moreover, petitioners must show that they "lack adequate alternative means to obtain the relief they seek." *Mallard v. United States District Court for the S. Dist. of Iowa*, 490 U.S. 296, 309 (1989).

Among the factors that this Court has recognized in determining whether to issue the writ are whether it is claimed that the lower court acted outside of its jurisdiction, whether the action complained of has thwarted or tends to thwart further appellate review, and whether granting the writ would remove an obstacle from review, rather than substitute for an appeal. *Roche*, *supra*, 319 U.S. at 26. Petitioners do not contend that the Fourth Circuit panel has acted "in excess of its jurisdiction" in the sense that the phrase is normally used, but they do contend that the panel's

failure to decide the case has plainly thwarted all further attempts at appellate review and that the issuance of the writ here would remove an obstacle that is standing immutably in the way to further review. It is also clear that the writ would not otherwise constitute a substitute for an appeal, for instance, by deciding any of the issues presented to the Fourth Circuit. Indeed, this is the classic case where a court had failed persistently and obstinately to adjudicate a case properly before it and the writ must issue.

As this Court has recognized, mandamus "shall be resorted to only in extreme cases," but "there is an end of patience." *La Buy v. Howes Leather Co. Inc.*, 352 U.S. 249, 258 (1957). Under all of the factors that this Court has cited, this is an extreme case in which patience is no longer appropriate. First, the delay of more than three years since the appeal was filed, and over 32 months since it was argued, is unconscionable by virtually any measure. Second, there can be no claim that the case is extraordinarily complicated or that it has far-reaching ramifications in other matters: the issues presented relate solely to the A.H. Robins Reorganization Plan and indeed only to small portions of it. While the appeal is vital to the claimants, the decision will have no impact beyond the four corners of this proceeding. Moreover, the five briefs below total only 176 pages, including the statements of fact in each brief and the overlap between the original appellants' brief and that of the intervenors.

Third, the panel is fully familiar with the issues presented, having sat on all of the many Robins appeals over the last eight years. Indeed, subsequent to the oral argument in this case, the same panel sat in another Robins case on April 8, 1992, and decided the case on June 22, 1993, a period of 14 months, or less than half the time that this case has been pending. *In re A. H. Robins Co., Inc.*, 996 F.2d 716 (4th Cir. 1993). Most significant of all on the unreasonableness of the delay is the fact that, when the appeals were taken from the confirmation of the

Reorganization Plan and from related orders, the same panel heard oral arguments in four cases in early December 1988 and in slightly more than six months, it issued decisions in all of them, producing opinions that cover nearly 100 pages in the *Federal Reporter*. *See In re A. H. Robins Co., Inc.*, 880 F.2d 694 (4th Cir. 1989).

The final factor to be considered is the need of the petitioners for a prompt resolution of the appeal. This is not a case in which there has been a money judgment entered, on which interest is running such that the parties can be made whole whenever a decision is rendered. As explained above, the issues relating to the holdback and the arbitration rules are vital to enable the claimants to make informed choices about whether to accept the offer of settlement made to each of them by the Trust, and if not, whether to seek resolution of their claims through arbitration or through the court system. Indeed, now that the Trust is demanding that claimants make an election between arbitration and litigation by a specific date, on pain of losing all of their rights (31a), the need for an immediate decision has now become urgent. While some uncertainty is inevitable in the law, the obvious need for a resolution of these issues, coupled with the extraordinary delay, presents a compelling basis for granting the writ and ordering the United States Court of Appeals for the Fourth Circuit to issue its decision forthwith in this appeal.

## CONCLUSION

For the foregoing reasons, the petition for a writ of mandamus should be granted.

Respectfully submitted,

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Attorneys for Petitioners

Dated: November 22, 1994

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF VIRGINIA**
**RICHMOND DIVISION**

| | | |
|---|---|---|
| IN RE: | | |
| A. H. ROBINS COMPANY, INCORPORATED, | ) | |
| Debtor. | ) | Chapter 11 |
| | ) | Case No. 85-01307-R |
| Employer's Tax Identification No. 54-0486348 | ) | Retained Proceeding |

***MEMORANDUM***

The issue before the Court is one in which the Dalkon Shield Claimants Trust ("the Trust") seeks entry of an administrative order governing all binding arbitration and litigation proceedings "commenced or to be commenced or recommenced" as authorized in accord with the approved Restated Plan of Reorganization ("the Plan"), the Claims Resolution Facility ("CRF"), and the Trust Agreement ("CTA") which are an integral part thereof. The Court, having considered the relevant pleadings, its own records, memoranda and arguments of claimants and counsel (including counsel appointed to represent claimants not otherwise represented), concludes as follows:

The long and arduous history of these bankruptcy proceedings, unrelentingly litigated, is amply demonstrated by a docket sheet containing in excess of 11,000 entries, rulings from the bench (118 court proceedings), written decisions of both this Court and, more importantly, in excess

of forty (published and unpublished) opinions of the United States Court of Appeals for the Fourth Circuit.[1]

On July 26, 1988, this Court confirmed the proposed Plan, which the Fourth Circuit subsequently affirmed. More than 94% of the personal injury claimants approved the Plan, thereby enacting it as proposed.

Prior to enactment of the Plan, the Court had estimated the monetary value of the personal injury claims to be in excess of $2.25 billion, a sum, as reflected by the evidence, much in excess of the liquidation value of A.H. Robins. With funding of more than $2.3 billion, the Plan, delayed by appeals, was finally consummated on December 15, 1989. Since that time, over 120,000 claimants have accepted the offers of the Trust in settlement of their respective claims.

The foremost issue before the Court may be said to center upon "Option 3" of the claims resolution process. The arguments of counsel at the recent hearing of the instant motion amply convince the Court that without its intervention where appropriate — pursuant to its supervisory power[2] over Dalkon Shield personal injury claim arbitration and litigation — and an order spelling out uniform directives and procedures coupled with the absence of an even playing field will result in a risk that worthy claimants will be shortchanged in receiving the compensatory damages to which they are entitled, as well as in the corollary possibility that other claimants will receive more than full and fair compensation.

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[1] History of this litigation and approval of the Court's supervisory powers are widely discussed in the following opinions: *In Re: A. H. Robins Co., Inc.*, 88 B.R. 742 (E.D. Va. 1988); *In Re: A. H. Robins Co., Inc.*, 880 F.2d 694 (4th Cir. 1989); *In Re: A. H. Robins Co., Inc.*, 880 F.2d 709 (4th Cir. 1989); *In Re: A. H. Robins Co., Inc.*, 880 F.2d 769 (4th Cir. 1989).

[2] 880 F.2d 769, 772.

The Court's approval of the Plan and the overwhelming support of it by claimants were premised on the fact that the Plan was drafted substantially in favor of the claimants, as it should have been, with settlement of the claims as a principal goal. The Order of Confirmation entered by this Court was specifically drafted to ensure that arbitration or litigation would be subject to the provisions of the CRF, which in turn mandated arbitration and litigation to be subject to "such other procedures as the Trustees may establish pursuant to the CRF."

While this Court has serious doubt that all aspects of the relief sought in the instant motion requires a specific order (in light of the fact that much of it is fully set out under the Plan, the CRF, and the CTA), experience has convinced the Court that while many counsel desire an even playing field, some unfortunately believe that the client with whom they are concerned at a particular moment is best served without regard to the effect on other clients or on non-client claimants. This conclusion is buttressed by the fact that this litigation focuses on a limited fund, which in time will be utterly depleted, a fact which is of concern and which all parties must consider. Still, at least one counsel purporting to represent a substantial number of claimants suggests that a temporary holdback of a portion of any awards is premature. Regrettably, he did not enlighten the Court as to how the failure to properly effectuate such a procedure could equate to equal treatment, if by failing to utilize a holdback the fund became unable to compensate those who followed claimants who were not subject to any holdback. In a sense, the Trust is in the business of endeavoring to go out of business, and the Court intends to do all in its power to assist the Trustees in seeing to it that in this process all claimants are treated equally. The road to accomplishing this contains pitfalls both known and unknown. The Court's action today is to a great extent a reaffirmation of the powers and responsibilities of the Trustees as dictated by the Plan.

While the Court understands counsel's obligation to serve each client fully, it must be kept in mind that this is a bankruptcy case requiring as a matter of law and fairness equal treatment to each claimant.

All of what is requested by the Trust in its motion, as the Court has indicated, is fully in accord with the Plan which encompasses the CRF and the Claimants Trust Agreement (CTA).

In view of the nature of certain objections to the instant motion, it would appear that specificity of the relevant provisions of the pertinent documents would, however, be helpful and to fully effectuate those provisions, the Court, consistent with its responsibility under Section 8.05 of the Plan as well as its supervisory powers as sanctioned by the United States Court of Appeals in *In Re: A. H. Robins*, 880 F.2d 769, 772, 776, will endeavor to address the issues raised.

First, it should be recognized that the Court, in part, is duty bound to enter orders in aid of the Plan, the CTA and the CRF, *see* Section 8.05(d), and such orders will be binding on all claimants and arbitrators. As suggested by the movants, an appropriate order will provide uniform directives and procedures common to all claimants electing binding arbitration or litigation of their Dalkon Shield claim. Hopefully, such an order will go a long way in preserving the assets of the Trust to the end that there is a fair distribution as compensation for injuries attributable to use of the Dalkon Shield. From the outset of this case, the Court has viewed fair compensation as *full* compensation.

Regrettably, for reasons best known to those responsible, the goal of full compensation, while still attainable, has been made the more difficult. One reason which occurs to the Court is a lack of cooperation on the part of some parties — although happily, not all. For example, the failure to supply, either intentionally or otherwise, pertinent information, particularly medical reports, has

created delay and caused what should have been unnecessary expenditures of time and monetary resources. Despite these difficulties, of those claimants who have responded to Option 3 offers, the amount accepted represents over 80% of the sums involved in such responses for an expenditure of more than $100 million.

It is to be noted that settlement of each claim was approved as the preferred resolution of more than 94% of the tens of thousands of claimants who voted for the Plan. In an effort to encourage that goal, the pertinent documents were drafted in such a manner as to create an uneven playing field in favor of the claimants. For example, Option 1, dealing primarily with what was phrased as "small claims," provided that if selected, the Trust waived without limitation all defenses excepting duplication of claims, previous payments or prior disallowance by the Court, or late filing (CFR "C").

Option 2 permits claimants who elect to do so, to receive a specified payment in accordance with a schedule. If selected, this option continued the utilization of an uneven field by precluding utilization by the Trust of all defenses to the claim other than challenge based upon duplicative claims, previous payment, late filing, previous disallowance by the Court, or invalidity of information submitted to support the claim.

Option 3, which is at the heart of the issues before the Court, requires the Trust to evaluate the claim

> ...(i) by developing a profile of the claim based upon criteria relevant to case value, including, without limitation, information as to the nature of the injury or damages claimed, whether the claimant is a wearer of a Dalkon Shield or is making a claim based upon another person's use of a Dalkon Shield, information contained in the claimant's claim file or the claim file of a related claim, and any defenses available to the Trust at this step; (ii) by comparing the profile to

> corresponding profiles based upon historical data; and (iii) by establishing an amount, if any, at which the comparison of the claimant's profile with historical profiles suggests that the claim should be allowed, taking into account the quantum and quality of the evidence supporting the claim, absence of in-depth scrutiny or discovery, the waiver by the Trust of defenses based upon the statute of limitations not evident from the face of the documents supplied or the face of the information form, lack of necessity of presentation of other evidence necessary under Option 3, other particularities that distinguish the pending claims from ones previously resolved, and any other factors the Trustees deem relevant.

It is to be noted that even at this stage efforts to encourage settlements as mandated, the defenses of statute of limitations are waived (by virtue of Trustees' policy decision), as well as a defense of medical malpractice.

Additionally, no proof of product defect is required, nor is any deduction made for funds a claimant may have received from other sources. In short, regardless of the law existing in a given state, the Trust adheres to the collateral source rule.

Finally, upon failure of a settlement in accord with E.5 of the CRF, a claimant may elect to go to binding arbitration or trial. It is at this stage that the Plan and the Trustees' exercise of their responsibility in relation thereto that the field begins to level.

Section E.5 of the CRF requires that a claimant who has not reached settlement under Option 3 in accord with the elapsed time requirements set out in E.4, elect either binding arbitration or a trial "only after having applied for and received a response from the Trust at the preceding level of this "Option 3." In plain, unequivocal language, no claimant

may commence arbitration or litigation until he or she has completed the procedures called for under the CRF and the Trust has verified this fact. Such verification will, if appropriate, be made by the Trust in an orderly but expeditious manner. To permit otherwise would be to introduce chaos in an otherwise efficient system. The Court does not contemplate difficulty as to this aspect. There will be no unnecessary delay of certification for arbitration or trial providing there is reasonable cooperation by all parties. Additionally, Section E.5(b) of the CRF, coupled with 8.04 and 8.05 of the Plan, are ample authority for the Court to take appropriate action to stay arbitration or trial if satisfied that undue prejudice will result if the Trust is within a limited period forced to arbitration or trial. This situation, should it arise, would not delay certification.

The Court envisions no undue delay consistent with the Court's constant concern that there be sufficient funds to compensate *all* deserving claimants in an equally fair manner. The Court commends to all parties a reading or rereading of Section E of the CRF which will be strictly adhered to.

Quite appropriately, the Trustees, in fairness to both the Trust and the claimants, in accordance with G.3 (a guideline which governs the CRF and the Claims Resolution Process), seek an order authorizing a specific dollar amount which may be withheld from any amounts awarded under Option 3, arbitration or by way of litigation. *See* G.3, CRF.

We deal here with a limited fund and the Court is convinced that in order to ensure equality in distribution among claimants as well as to ensure continued availability of funds to pay all obligations of the Trust that a holdback of a portion of payments called for by any award is imperative.

The Court has, from the beginning, conferred with the Trust's computer and statistical experts pursuant to the Court's supervisory powers to monitor the funds to the end that the Court be reasonably satisfied that full and fair

compensation be available to compensate all worthy claimants.

The Court is satisfied that absent extraordinary circumstances, a continued utilization of the process now in effect, coupled with a continuation of the safe and efficient method of investment embarked upon by the Trustees and the continued alertness by the Director, the Trustees and the Court in minimizing those administrative costs within their power, all entitled claimants will be fully compensated. Certain costs, to some extent, are unpredictable. For example, the cost of arbitration or litigation cannot, with any specificity, be more than an educated estimate. The need for expert testimony and its costs is, for now, uncertain. Additionally, the number of claimants who choose arbitration are unknown as are the presently filed late claims and future late claims which may warrant timely treatment. Each of the aforementioned aspects are indications that there is in fact a real danger that without a holdback, there is a risk of not having sufficient funds to fully compensate claimants.

If, as contemplated and encouraged by the terms of the Claims Resolution Facility, a continued high rate of settlements continue, the Trustees may at such time as they deem appropriate, direct the payment of all or a portion of any holdback. Hopefully this can occur periodically.

As heretofore indicated, the settlement offers to date are consistent with the historic settlements and the Court concludes that such offers, excepting those made in lieu of transaction costs, represent a substantial amount as contemplated by G-3 — hence, such offers constitute an appropriate guideline in determining the amount of any holdback. The Court, and the Trustees, have concluded that such a holdback will assure the continued availability of funds in order to further the ultimate purpose.

Arbitration costs, excluding the organizational cost and those expert fees, if any, which the arbitrator may in his discretion apportion as he or she deems appropriate, will be

borne by the claimant and the Trust. Nevertheless, the cost to the Trust will be substantial.

It is to be borne in mind that at this stage the Plan's goal of settlement is no longer a viable option, and quite appropriately the playing field becomes more level. All available defenses may be asserted by the Trust, other than absence of product defect. The total cost to the Trust will, of course, depend on the number of claimants who choose arbitration. In considering the amount of holdback in regard to an award of arbitration or judgment secured at trial, the Court takes notice that its records indicate that as of June 18, 1991, over 40,000 claimants are categorized as having failed to file a timely claim. Over 21,000 of these claimants have sought timely treatment and potentially, though highly improbable, each may ultimately be declared to be a timely claimant. The Court has held hearings for hundreds of these claimants and has as yet made no final decision, although in some instances the Trust, after further review, has withdrawn any objection to a small number of specific claimants being found to have filed a claim in a timely manner. Still, late claims continue to be filed seeking timely treatment. The potential for unanticipated costs in reference to all expenditures outside of the cost of settlements based on historical data demands caution.

The Court intends to proceed with caution as being in the best interest of each of the claimants.

It is the Trustees' conclusion that to properly effectuate their responsibility and to assure the continued availability of funds to pay all valid Dalkon Shield personal injury claims as well as to further the other purposes of the Plan, the Trust will, in satisfaction of all awards or judgments (including awards of judgments of costs, fees or disbursements) obtained as a result of arbitration or litigation, pay initially only that portion of such an award of a judgment which does not exceed the greater of $10,000.00 or the final settlement offer made by the Trust under Option 3, Section E.4 of the CRF. The Court cannot substitute its judgment in this regard

in light of the fact that payment of the claims under G-3, as referred to *supra*, is wholly within the Trustees' discretion.

As a consequence of the Court's exercise of its supervisory powers, the Court is satisfied that the actions of the Trustees are neither capricious nor arbitrary. Indeed, while the Court is not privy to the specifics of the method utilized by the Trust in determining full and fair compensation, the Court, because it had to approve the expenditure for professionals utilized by the Trustees, knows that such procedure was formulated only after consultation with eminent medical personnel, at least twenty-five plaintiffs' attorneys and additional trained claim personnel thoroughly familiar with Dalkon Shield claims. Additionally, the Trust utilized personnel trained in the field of statistics and computers.

In short, the Trustees' exercise of the authority granted to them alone under the Plan, has been accomplished with caution.

This same discretion and caution supports in toto the Trustees' instant motion.

The Trustees have determined to maintain a document depository containing substantially all documents which it avers have been identified as having been produced without qualification by Robins in its pre-petition personal injury tort litigation. Access to these documents and videotapes will be available for copying to any claimant desiring them. Such an undertaking inures to the claimant's benefit and is supported by the Court.

Under the Plan, in the interest of minimizing costs, the Trustees have, as they have the right to do, applied in the instant motion for the Court to, as it will, exercise its powers, including those powers permitted by 28 U.S.C. §§ 157 and 1334.

The prospect of imposing on an already overloaded state and federal judicial system to monitor discovery proceedings is, in and of itself, grounds for the Court to

grant the Trustees' application. Additionally, any issues which may arise will of necessity require familiarity with the pertinent documents in this cause. This Court of necessity is reasonably familiar with said documents. Not insignificant is that the Court must be cognizant of the discovery efforts to be assured that the law of the case is adhered to as expressed by both the Court of Appeals and this Court. While the Court is satisfied that any trial judge could and would perform this function, under CRF 5(c), upon application of the Trust, this Court is mandated to exercise its power, for good cause, including its power under 28 U.S.C. §§ 157 and 1334 to "limit, control, coordinate or consolidate discovery undertaken or requested in connection with any trial or arbitration proceeding."

Further, interference with the business of the Trust must be kept to an absolute minimum. Additionally, any discovery of the personnel of the Trust, and generally of any other person or entity, must be kept to a necessary minimum and will be limited to the precise issue in each instance.

In any event, the Court does not anticipate more than minimum discovery. Except for specific issues (specifically in the absence of any issue of punitive damages as is the law of the case by which each claimant is bound), one envisions primarily expert testimony as to causation. Nevertheless, the expense of both arbitration and litigation is not presently predictable and can, in the Court's view, be minimized only by cooperation and strict adherence to the Rules of Arbitration as developed by the Trustees under CRF 5(a). The Court, under its prior Order as well as under Section E.5(c) of the CRF and in accord with 28 U.S.C. §§ 157 and 1334 will limit, control, coordinate and/or consolidate all discovery in arbitration and litigation.

The primary issue in reference to arbitration which has evoked vigorous objection by many claimants deal with the Trustees having promulgated Rule XV-H, dealing with choice of law and which mandates the application of the substantive laws of the Commonwealth of Virginia in

deciding the issues. Additionally, Rule XV-I sets a three-year statute of limitations period.

Objectors argue that this action by the Trustees is impermissible and contend that the Court is duty bound to reject the Trustees' rule and substitute a rule mandating the application of the substantive laws of Maryland or, at the least, require the application of Maryland's statute of limitations. In the absence of a violation of the Plan or arbitrary and capricious conduct, the Court has the duty to require the rules promulgated by the Trustees to be binding upon claimants, the Trust, and the arbitrators.

As the Court has noted, the sole responsibility for the promulgation of arbitration rules rests with the Trustees. Absent arbitrary and capricious conduct on the part of the Trustees in fulfilling this responsibility, the Court is without power to inject itself. Indeed, no authority to the contrary has been cited to the Court.

Initially, the Court expressed doubt at the hearing of May 21, 1991 that the issue was one requiring the Court's intervention.

> "Well, now, the Court doesn't have any — that isn't anything that the Court gets involved in, is it?" Tr. 21.

At that time the Court suggested that certain changes in the rules be made, including granting a choice of law to each claimant premised on the claimant's domicile. The Trustees have not, however, adopted the Court's suggestion, and on further consideration the Court believes them to be correct.

Objectors point to paragraph G-11 of the Guidelines which govern the CRF and the Claims Resolution Process as authority for contending that the Trustees have acted in violation of the CFR.

G-11 reads as follows:

> 11. Applicable Law. The law to be applied *to the settlement or trial* of claims shall be the law that is or would have been applicable

> notwithstanding the pendency of the chapter 11 case; provided, however, that the statutes of limitations and repose applicable to claims are tolled in accordance with the Bankruptcy Code. Pursuant to this provision, claimants who would have been or are entitled to file suit in Maryland may avail themselves *of the Maryland law* concerning the accrual and limitation of actions. Notwithstanding anything in this paragraph, *punitive damages shall not be paid, except as provided in section 14 below.* In order to reduce costs, the Trustees may waive the statute of limitations defense for purposes of settlement and *take into account normal deductions for the statute of limitations defense.*
>
> (Emphasis added).

Because of the fact that the Trust does business in Maryland, and the debtor before it did, likewise all claimants were eligible to utilize the Maryland statute in litigation in that state. G-11 of the Guidelines goes on to state that the "Trustees may waive the statute of limitations defense for purpose of *settlement.*" (emphasis added.) Indeed, this provision was consistent with the Plan's effectuating, for *settlement*, an uneven field in favor of the claimants. The fact is that the utilization of a statute of limitations as a defense was, and is, under the settlement procedures, adopted by the Trust in the implementation of Options 1, 2 and 3, ignored. In short, settlement is not to be equated with binding arbitration as provided for in CRF E.5. Settlement, unlike arbitration or trial, contemplates a mutual agreement as to the sums to be paid.

Arbitration is available to claimants only after efforts required by the CRF have failed. It is at this stage that the field becomes more level, for here, for the first time since any claim was made to the Trust, all defenses except product defect may be asserted by the Trust. *See* E.5(a) of the CFR.

The field becomes even, at the option of the Trust, under E.5(b) dealing with trial. Under that provision, all claims and defenses are available to both sides.

The fact that all claimants will be, during arbitration, bound by the same rules of law, is entirely appropriate in the context of a bankruptcy proceeding.

The language of G-11 is too plain to be interpreted to include arbitration. The guideline is unequivocally specific in referring only to *settlement or trial*. Further elaboration in any great detail would, in the Court's view, be fruitless.

Objectors' argument that the rule in issue is contra to the principle that settlement is to be preferred over arbitration and arbitration over trial is not viable. Such an argument overlooks the fact that arbitration, though costly to the Trust, is obviously less costly to both claimant and the Trust than a trial. Additionally, defenses available at a trial are not, as the Court has heretofore made reference, available to the Trust at arbitration. Finally, in this regard, a claimant may under the arbitration rules be represented by one not a member of the bar.

Counsel for the Trust, without contradiction, referred to a survey by the Trust which reflected that the three-year limitation under Rule XV-I of the Arbitration Agreement is one which is equal to or more favorable to a claimant in 40 states. The same survey reflects, so counsel contends, that the discovery provision dealing with accrual and against when a claimant discovers or reasonably should have discovered her injury are similar to the requirements of 46 states while 33 states require no causal connection to have been discovered in order for accrual. Thirteen states, so counsel states, require a knowledge of wrongful conduct, or the existence of a defective product in order for accrual to exist.

The Trustees have exercised their authority in a reasonable manner and interference by this Court is unwarranted. The Maryland statute is of course available to

those claimants who are eligible to and choose to litigate in that state.

The balance of the suggested Order, not unlike much of which the Court has already referred to, is in strict compliance with the Plan and needs no elaboration.

An order will follow.

/sig/
UNITED STATES DISTRICT JUDGE

/sig/
UNITED STATES BANKRUPTCY JUDGE

Date_____

NOTICE OF JUDGMENT OR ORDER

Entered On Docket June 26, 1991

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF VIRGINIA**
**RICHMOND DIVISION**

| | | |
|---|---|---|
| IN RE: | | |
| A. H. ROBINS COMPANY, INCORPORATED, | ) | |
| Debtor. | ) | Chapter 11 |
| | ) | Case No. 85-01307-R |
| Employer's Tax Identification No. 54-0486348 | ) | Retained Proceeding |

***AMENDED ADMINISTRATIVE ORDER NUMBER 1***
***GOVERNING DALKON SHIELD***
***ARBITRATION AND LITIGATION***

For the reasons stated in the Memorandum filed in this cause on June 26, 1991, and having ascertained that the Order accompanying said Memorandum contained typographical errors and omissions, it is Adjudged and Ordered that said Order of June 26, 1991, shall be and is of no force or effect and that the instant Order is substituted therefore.

For the reasons stated in the Memorandum filed in this cause on June 26, 1991, and in accord with the Plan of Reorganization in this cause, deeming it proper so to do, it is ADJUDGED AND ORDERED as follows:

1. Every holder of a Dalkon Shield Personal Injury Claim and every person (including counsel) commencing binding arbitration or commencing or recommencing litigation of a Dalkon Shield Personal Injury Claim under Section E.5 of the Claims Resolution Facility shall be bound by this Order. (Such holders, persons and counsel are referred to herein as "Claimant"; such arbitrations and litigations are referred to herein as "Arbitration" and

"Litigation".) Every Arbitration arbitrator shall likewise be bound by this Order.

2. No Claimant shall commence Arbitration or shall commence or recommence Litigation until this Court has certified by entry of an order, upon the application of the Trust, that: (i) the claims review process respecting the applicable Dalkon Shield Personal Injury Claim has been completed in accordance with the Claims Resolution Facility ("CRF"), and (ii) as a matter of law, where a Claimant intends to proceed with such Arbitration or Litigation in a venue outside the United States, the venue is appropriate and the courts of such venue and jurisdiction will honor and enforce (whether by reason of the Claimant's stipulation or otherwise) this Order and the Plan. Such certification may be revoked upon a subsequent showing that the procedures of the CRF were purposefully or materially circumvented, or that the certification was otherwise improvidently granted, in which event the applicable Arbitration or Litigation may be ordered dismissed or stayed by this Court.

3. This Court retains jurisdiction as provided by Section 8.05 of the Plan, and by applicable law, including exclusive jurisdiction as against any Arbitration or Litigation:

a. to resolve controversies and disputes regarding interpretation and implementation of the Plan, the Trust Agreements, the CRF, the releases obtained by the Trusts (or either of them), any amendments of the Trust Agreements, and in accordance with the provisions of the CRF, any disputes relating to whether or not a timely and proper notice of claim was filed, the rights of holders of Late Claims and whether a Disallowed Claim should be reinstated;

b. to enter orders in aid of the Plan, the Trust Agreements, the CRF and releases obtained by the Trusts (or either of them), including, but not limited to, appropriate orders (which may

include contempt or other sanctions) to protect the Debtor, the Successor Corporation, AHP, any of the Affiliates thereof and other Persons from actions prohibited under Article VIII of the Plan;

c. to modify the Plan pursuant to Section 9.06 of the Plan; and

d. over actions challenging the validity and enforceability of the releases and injunctions referred to in Sections 8.03 and 8.04 of the Plan.

4. The Trust shall maintain a document depository in Richmond, Virginia, containing substantially all documents which the Trust, using its best efforts, has identified as having been produced without qualification by Robins in pre-petition Dalkon Shield personal injury tort litigation. Upon reasonable written notice to the Trust, a Claimant may visit the depository at any time during working hours and will have full access to all documents and videotapes located there. A copying service will be located on or near the depository premises where copies of any document or videotape may be made at the Claimant's request and expense.

5. In addition to maintenance of the document depository described in Paragraph 4, the Trust shall, upon request, provide to a Claimant who has properly elected Arbitration or Litigation, free of charge, the catalog that indexes materials and documents used in previous Dalkon Shield personal injury tort litigation and which was developed and compiled by the law firm formerly known as Robins, Zelle, Larson & Kaplan, with the cooperation of other attorneys throughout the country, and which was distributed by the Minnesota Trial Lawyers Association. The Claimant may obtain, at the Claimant's expense, any materials and documents from this catalog by placing an order for them directly with the copying service which maintains these catalogued materials and documents.

6. No discovery by a Claimant against any person or entity shall be conducted in connection with any Arbitration or Litigation except:

a. as provided in Paragraphs 4 and 5 above;

b. discovery against persons or entities, including doctors, hospitals and other health care providers, not a party to the Arbitration or Litigation but excluding Robins, AHP, the Successor Corporation, Aetna, any of their respective Affiliates and any of their present or former officers, directors, employees, attorneys, agents, or representatives;

c. discovery against the Trust solely through the use of interrogatories and requests for admissions which shall be limited to issues related to individual Dalkon Shield Personal Injury Claims and which shall not include issues of Trust administration, provided, however, that discovery shall be permitted against persons identified by the Trust as expert witnesses to be called by the Trust in the respective Arbitration or Litigation;

d. as provided by the rules developed by the Trust respecting Arbitration; and

e. as further ordered by this Court upon request of the Claimant.

All discovery disputes arising in Arbitration or Litigation may be resolved by this Court.

7. No Arbitration or Litigation shall be filed or proceed against any person or entity other than the Trust except as provided in Section 8.04 of the Plan respecting Unreleased Claims. No claim alleged to be an Unreleased Claim shall be asserted against any person or entity absent an order by this Court finding that such claim satisfies the provisions of Section 1.85 of the Plan.

8. Following the entry of the certification order described in Paragraph 2 above, service of process on the

Trust in the respective Arbitration or Litigation may be made by certified U.S. first-class mail, return receipt requested to Linda J. Thomason, Counsel, Dalkon Shield Claimants Trust, P.0. Box 1314, Richmond, Virginia, 23210. Service by this means shall be effective upon receipt by the Trust.

9. No claimant shall seek, directly or indirectly, or be awarded damages in the nature of trebled, exemplary, punitive or similar damages, or attorneys' fees in any Arbitration or Litigation.

10. Any Claimant commencing Arbitration or commencing or recommencing Litigation shall forthwith:

a. conform all pleadings to the terms of this Order by substituting the Trust as the defendant, by deleting or dismissing all other defendants and respondents (except insofar as an order has been obtained pursuant to Paragraph 7 above, respecting an Unreleased Claim), by deleting or dismissing any claim for punitive damages and by taking all other necessary action; and

b. file this Order and the certification order described in Paragraph 2 above with the Arbitration arbitrator or Litigation court as exhibits to, and incorporated in, the initial pleadings commencing or recommencing Litigation.

11. This Court may stay or order the parties to seek a stay of any Arbitration or Litigation upon a showing by the Trust (i) of undue prejudice due to the multiplicity of ongoing, pending or scheduled trials or arbitration hearings or (ii) that an Arbitration or a Litigation is proceeding in violation of this Order, in contravention of this Court's jurisdiction or in violation of the Plan.

12. The Trust, any Claimant, any arbitrator involved in, and any award resulting from, an Arbitration shall comply with the rules developed by the Trust respecting Arbitration. Judicial review, if any, of an Arbitration or an

Arbitration award shall be, in the first instance, by this Court.

13. No levy against the Trustees, the Trust or its assets may be made as a result of any Arbitration or Litigation. Until further order of this Court, in order to assure the continued availability of funds to pay all valid Dalkon Shield Personal Injury Claims and in order to further the other proper purposes of the Plan, Trust and CRF, in satisfaction of all awards or judgments (including awards or judgments of costs, fees or disbursements) obtained as a result of Arbitration or Litigation, the Trust shall:

a. pay initially only that portion of such an award or judgment which does not exceed the greater of $10,000.00 or the final settlement offer made by the Trust under Option 3, Section E.4 of the CRF; and

b. after the payment in full of all valid, timely Dalkon Shield Personal Injury Claims which are settled under Options 1 or 2 or under Option 3, Sections E.1-4 of the CRF, or at such time as the Trustees are satisfied that all valid, timely Dalkon Shield Personal Injury Claims can be fully paid, next pay pro rata from any Trust assets available for that purpose the unpaid balances of all Arbitration awards and Litigation judgments.

14. The Trust shall give notice by mail of the entry of this Order, accompanied by a signed copy of the Order, to all claimants holding timely or late-filed Dalkon Shield Personal Injury Claims or to their counsel, as reflected by the records of the Trust.

15. A Claimant who desires relief from this Order shall file an appropriate motion in this Court stating the particular circumstances warranting such relief.

DATE July 1, 1991
nunc pro tunc
June 26, 1991

/sig/
UNITED STATES DISTRICT JUDGE

/sig/
UNITED STATES BANKRUPTCY
JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

| | | |
|---|---|---|
| ALEXIA ANDERSON, *et al.*, | ) | |
| Appellants, | ) | |
| v. | ) | No. 91-1752 & |
| | ) | Consolidated Cases Nos. |
| THE DALKON SHIELD CLAIMANTS TRUST, | ) | 91-1751 and 91-1753 |
| Appellee. | ) | |

**PETITION FOR REHEARING**
**WITH SUGGESTION FOR REHEARING IN BANC**

*Introduction and Statement of Purpose*

This is a highly unusual petition for rehearing, but the circumstances that necessitate its filing are highly unusual. This expedited appeal, which deals with the validity of certain post-confirmation orders in this 8-year old bankruptcy case, has been pending decision after expedited oral argument for more than 21 months, and it appears that the panel has overlooked the facts demonstrating that an immediate decision is required and that nothing short of action by the full Court will result in a ruling on the merits. As more fully explained below, this is not an ordinary appeal, but one whose prompt resolution is essential to virtually every one of the thousands of claimants whose

claims remain unresolved because of the extraordinary impact that the challenged orders have on them and on the appellee Dalkon Shield Claimants Trust, which is administering the claims resolution process. It is for these reasons that this petition is being filed, after the appeal was heard, but before any decision has been rendered.

*Reasons for Granting Rehearing*

1. This appeal arises out of the A.H. Robins, Inc. Chapter 11 reorganization which was filed in the United States District Court for the Eastern District of Virginia in August 1985 and whose confirmation order was finally upheld by the United States Supreme Court in November 1989. Pursuant to that order, an elaborate reorganization plan was approved, under which all of the nearly 200,000 Dalkon Shield claimants first had to file administrative claims with the Trust before they could either go to court or have their claims arbitrated.

2. As part of its continuing jurisdiction over the plan, the District Court, at the behest of the Trust, issued the June 26, 1991 orders that were the subject of these consolidated appeals and which affected nearly every unresolved claim pending before the Trust. The *Anderson* appellants, who filed the appeal, objected to two aspects of the orders: (1) the "certification" procedure, which allowed the Trust to deny any claimant access to the judicial remedy specifically guaranteed by the reorganization plan, by simply refusing to certify to the District Court that the administrative process was concluded, and (2) the "holdback" provision, under which no claimant could be paid more from the Trust than the Trust's final settlement offer, *even if the claimant won a final judgment from a court in a greater amount*, until all claims had been resolved or the Trust determined that there would be sufficient funds to pay all remaining claimants in full. Subsequently, this Court permitted intervention by claimants Fisher *et al.*, who raised additional issues relating to the validity of key provisions of the rules that would

govern all arbitrations under the plan, which are available to any claimant who elects that method of claims resolution. However, the rules approved by the District Court have extremely unfavorable choice of law and statute of limitations provisions which make it very unlikely that most claimants would elect arbitration, even if they would otherwise be inclined to do so.

3. Both appellants and intervenors argued that the challenged provisions were inconsistent with specific portions of the plan, which this Court had approved, and hence were unlawful. In addition, because these orders dealt with the ongoing claims process, which effected almost every claimant, and because the validity of the holdback and arbitration provisions would have a significant, and in many cases determinative, impact on whether the claimant accepted the settlement offer made by the Trust, and, if not, whether to elect litigation or arbitration, all parties recognized the importance of a prompt decision to enable the claimants to make informed decisions, whichever way this Court ruled. Indeed, with respect to the holdback, the Trust has candidly admitted that the aim of this provision is to apply additional pressure on claimants to accept settlement, a rationale that the District Court also embraced. That coercive impact, which we contend is unlawful, continues to be achieved until this Court rules on the holdback provision.

4. Despite the obvious urgency of this appeal, the matter has gone unresolved for over 21 months after argument. Appellants promptly filed their opening brief, after also briefing and prevailing on the Trust's motion to dismiss the appeal for lack of an appealable order, and the Trust filed its brief on time as well. The appeal was then slowed down for about a month after the intervenors were allowed to enter the appeal to raise the arbitration issues and file their brief. Even after appellees were allowed to file a supplemental brief, all briefs were filed by the end of January 1992, and oral argument was heard on March 4, 1992, by the same panel that has heard all of the appeals

arising out of the Robins reorganization: Circuit Judges Russell, Weidener, and Chapman. Argument was quite spirited, with the entire panel showing an in-depth grasp of the issues presented, aided in substantial part by the many prior appeals in the Robins matter.

5. Nonetheless, despite the obvious urgency of the appeal, the level of preparation of the panel, and the relatively straight-forward nature of the issues presented, there is still no decision. By way of contrast, when the same panel had four separate Robins appeals before it at the same time, involving very complex issues of bankruptcy, federal jurisdiction, and due process, the panel was able to resolve all four appeals in little more than six months, including issuing opinions that span nearly 100 pages in the Federal Reporter. *See* 880 F.2d 694 *et seq*. Petitioners are at a loss to understand the reason for the delay. They can only assume that the appeal has been misplaced or that the panel has decided not to decide the case for reasons known only to it. But whatever the explanation, 21 months is far too long for any case to await decision by a federal court of appeals, let alone in a case where the need for an immediate ruling is so apparent to all.

6. Accordingly, under these circumstances, petitioners have no choice but to seek rehearing, in the hope that rehearing will produce a decision by the panel, or, in the alternative, that this Court will rehear the case in banc so that the panel cannot, acting on its own, withhold the decision on this appeal.

7. Petitioners are aware of no case or other authority that directly supports the relief sought in this petition, but there is no authority of which they are aware that is to the contrary. Moreover, although Rule 40 of the Federal Rules of Appellate Procedure specifies the time within which a petition for rehearing must be filed after an initial panel decision, as does IOP 40.2 of this Court, there is nothing in the Rules which prohibits the filing of a petition for rehearing prior to the issuance of a panel decision.

Admittedly, this petition and its timing are highly unusual, but, as we said at the outset and have demonstrated above, so are the facts that justify the relief sought. And if the Court concludes that the specific relief sought is not available through a petition for rehearing, we ask the full Court to treat this as a petition for extraordinary relief under the All-Writs Act, 28 U.S.C. § 1651, under which all of the same facts would justify relief under that provision also.

WHEREFORE appellants and intervenors urge this Court to grant rehearing or in the alternative rehearing in banc.

Respectfully submitted,

Alan B. Morrison

Public Citizen Litigation Group
2000 P Street, N.W.
Suite 700
Washington, D.C. 20036
(202) 833-3000

Attorney for Appellants

Michael Pretl, Esq.

Pretl & Erwin, P.A
2600 Saint Paul St.
Baltimore, MD 21218
(410) 235-9000

Attorney for Intervenors

December 13, 1993

CHRISTIAN, BARTON, EPPS, BRENT & CHAPPELL
1200 MUTUAL BUILDING
909 EAST MAIN STREET
RICHMOND, VIRGINIA 23219-3095

ORRAN LEE BROWN

REPLY TO:
P.O. BOX 1314
RICHMOND, VA 23210

September 27, 1994

BY HAND

The Honorable Bert M. Montague, Clerk
United States Court of Appeals
for the Fourth Circuit
1100 East Main Street
Fifth Floor
Richmond, Virginia 23219

Re: **Alexia Anderson, et al. v. Dalkon Shield Claimants Trust, Case No. 91-1752 and Consolidated Cases Nos. 91-1751 and 91-1753**

Dear Mr. Montague:

The appellants in these cases appealed two provisions of the district court's Amended Administrative Order No. 1, entered June 26, 1991. The "holdback provision" in paragraph 13 of that Order is one of them. This holdback provision stated that claimants who obtained arbitration or litigation awards of more than $10,000 would be paid the greater of $10,000 or the amount of the Trust's final settlement offer to the claimant, with the balance held back until all settled claims have been paid or until the Trustees were to determine that all valid and timely Dalkon Shield Claims could be fully paid.

Since the Administrative Order was entered, as described at pages 34-35 of the Trust's Brief on appeal, the Trustees have constantly monitored the progress of claims resolution, including the rate of settlements and the results of arbitrations and trials on Dalkon Shield claims, so that they could

adjust the holdback procedure to reflect changing circumstances. Such adjustments have been reported to the district court within its retained jurisdiction in § 8.05 of the Robins Plan of Reorganization. The Trust would also like to apprise you of them.

The Trustees have modified the procedures for implementing the holdback provision on three occasions. On September 1, 1993, the minimum payment on awards and judgments was elevated from $10,000 to $25,000, so that a claimant with an award higher than that amount would be paid the larger of $25,000 or her Option 3 offer. On February 16, 1994, the payment was increased to the greater of $75,000 or the offer amount. On September 15, 1994, it was moved to $175,000, thereby allowing the arbitration or litigation plaintiff who obtains a final judgment of more than $175,000 to be paid now the greater of $175,000 or the amount of her Option 3 offer, with the remainder held back until the Trust is able again to adjust the policy.

All final judgments below $175,000 are paid in full. At that level, the holdback does not currently affect any claimant, as no plaintiff holds a final judgment against the Trust exceeding $175,000. The Trustees will continue to supervise this procedure carefully in light of further developments.

A copy of this letter is being sent to all counsel of record for the appellants. If you should desire more information or that this be presented in any more formal manner, the Trust will be happy to proceed in whatever fashion you or the Court may direct. If there are any questions or comments, please contact me.

Very truly yours,

/sig/
Orran Lee Brown

cc: Douglas E. Bragg, Esquire
Bradley Post, Esquire
Henri E. Norris, Esquire
Barry B. Johnson-Fay, Esquire
Alan B. Morrison, Esquire
Michael A. Pretl, Esquire

**DALKON SHIELD CLAIMANTS TRUST**
Claims Resolution Facility
Post Office Box 444
Richmond, Virginia 23203

Michael M. Sheppard | 8am - 5pm | 1-804-783-8600
Executive Director | Monday - Friday | FAX 1-804-782-0156

June 15, 1994

**READ THIS FIRST**

***IMPORTANT NOTICE OF SEPTEMBER 1, 1994 DEADLINE***

By Certified Mail,
Return Receipt Requested

DS 232154
CATHERINE S. PEACH
C/O BROWN & SZALLER CO L P A
STE 324A ATRIUM OFFICE PLAZA
668 EUCLID AVE
CLEVELAND OH 44114

Dear Claimant:

You have a claim for damages pending with the Dalkon Shield Claimants Trust relating to the Dalkon Shield intrauterine device. You filed this claim and elected to process it under Option 3 of the Claims Resolution Facility (the "CRF") several years ago.

The Trust evaluated your claim under Option 3 and extended an offer of compensation to you. After rejecting that offer, you chose to go through the In-Depth Evaluation/Settlement Conference step of Section E.4 of the CRF. You then rejected or failed to accept your final Option 3 offer and that offer was withdrawn. Over a year ago, the Trust sent you a Claims Resolution Election form on which you were to state whether you wished to go to binding arbitration or trial to resolve your claim. You were told to complete that form and return it to the Trust before your claim could go forward.

You have not returned your election form. This inaction left us unable to process your claim.

If, however, you believe you did return the form, call us immediately

Your failure to return your form caused your claim to stall in the resolution process. Since the Trust must take steps to address such claims, it has set a **deadline of September 1, 1994**, for you to act on your claim. To remain eligible for compensation on your claim, you must make sure the Trust receives your response to this letter **no later than September 1, 1994**, or the Trust will begin further steps leading to the disallowance of your claim. **If the Trust disallows your claim, you will be forever barred from asserting a claim or getting any money from the Trust or any other person for injuries relating to Dalkon Shield.**

1. **If You Want To Get Paid On Your Claim Now.**

Your former Option 3 offer was withdrawn when you did not accept it within ninety days after your settlement conference. Because your claim had been inactive for so long, however, the Trust conducted a re-review of all your claim materials. In a re-review, the Trust analyzes a claim again and extends an offer of compensation to the claimant. This re-review offer may be the same as the claimant's former Option 3 offer, but it also may go up or down, depending upon the information in the claim file. In most instances, re-review results in the same offer.

The Trust's re-review of your claim resulted in an offer of compensation to you in the amount shown on the enclosed offer letter and General Release of Claims. To be paid that amount in full settlement of your claim, you should carefully read that Release and, although you do not need an attorney for this step, review the Release with your attorney if you are represented. Then, sign the Release in the presence of a notary public, have the notary certify your signature, and return the Release to the Trust by the September 1, 1994 deadline. You should keep a copy of it for your records.

When the Trust receives your Release, it will make sure you have properly completed it. If everything is in order, the Trust will mail your payment check as soon as practicable, and expects to do so within thirty days of receipt of your Release.

2. **If You Want To Continue Processing Your Claim Rather Than Get Paid Now.**

If you decide not to accept the offer shown on the enclosed Release, and instead would like to continue processing it under the CRF, you must now decide whether you want to use Alternative Dispute Resolution ("ADR"), binding arbitration, or trial to conclude your claim. In making that decision, you may find significant the overall results of ADR hearings, arbitration cases, and jury trials on claims against the Trust to date. This information is shown on the enclosed charts of ADR Statistics and Jury Trial/Regular Arbitration Hearing Results, and is explained here.

ADR is designed to allow claimants the opportunity to present their cases in person to a neutral party and resolve their claims as quickly as possible and with as few legal complications as possible. The maximum amount recoverable in ADR is $20,000.

As of June 10, 1994, approximately 1,000 claims had been resolved through ADR. The Trust had offered these claimants a total of $1,116,923 under Option 3. After the ADR hearings on these claims, the referees awarded the claimants a total of $4,576,244 in damages, which is more than four times what the Trust had offered.

As of June 10, 1994, decisions have been received in nineteen regular arbitration cases and jury trials against the Trust involving twenty-three claimants. The Trust's Option 3 offers to these claimants totaled $775,609. The claimants had submitted counteroffers demanding a total of $11,980,000 in damages. In twelve of the cases, the claimants recovered nothing. The juries or the arbitrator found in favor of the Trust in eleven of those cases and the court directed a verdict for the Trust in the twelfth. One other case resulted in a mistrial. Only six plaintiffs have prevailed against the Trust, and they were awarded a total of $503,500 in damages.

A Claims Resolution Form is enclosed. Use it to state your choice of ADR, binding arbitration, or trial to resolve your claim. You must fill out that form and return it to the Trust by the September 1, 1994 deadline.

You should read this letter and the enclosed materials carefully. Consider your individual circumstances and make your decision. Whatever choice you make, you must plan ahead to ensure that the Trust receives your response by the September 1, 1994 deadline. The Trust will not accept any material by facsimile transmission. If you have any questions, you may call us at (804) 343-4410 between 9:00 a.m. and 5:00 p.m. EDT, Monday through Friday.

Sincerely,

Dalkon Shield Claimants Trust

Enclosures:

Offer Letter
General Release of Claims
Claims Resolution Election Form
ADR Statistics Chart
Trial/Regular Arbitration Hearing
Results Chart
Return Envelope

## PETITIONERS/APPELLANTS

Alexia Anderson; Barbara Anderson; Philip Anderson; Paula C. Bannow; John Bannow; Diana Beard; Robert Davis; Sherry Bergman; Charles Bergman; Vicki Jean Berman; Marsha Brown; Jeannette Chloe Bulinski; Gregg Gunderson; Lillian Castillo; Susan Chamberlayne; Denise Crowell; Mike Crowell; Jacki Dasso; John Thompson; Carol Evans; Dennis S. Evans; Carla Magdanz Everett; Julia Bloch Frey; Carmen Graham; Ronald Graham; Xenia D. Graves; Cheryl Gruse; Roberta Guildner; Ava Hamilton; Delmar Hamilton; Dolores M. Haro; Lori Haugland; Mary Rutledge Hein; William Hein; Mary Frances Hilko; Ellen Holmes; Susan K. Kaan; Judy Kurtz; Judith Lavezzi; Susanne Leuthauser; Truman Leuthauser; Harriet Elizabeth Mann; Sharon L. Mazotti; Daniel Mazotti; Janet Gamet McMahon; George McMahon; Linda Medina; Laurel Ruth Mifflin; John Mifflin; Nathan Mifflin; Sandra Diane Miller; John K. Miller; Betsy Munson; Mary Ann Perkins; Russell Perkins; Ravonda Lou Potter; Roger Jay Potter; Sandra L. Powell; Pamela Reiter; Peter Reiter; Elaine Rogers; Donis Rogers; Ella Ruth Rogers; Christine Seiffert; Judith Sheppard; M. Lee Sheppard; Trudi Carter Smith; Evelyn Snyder; Andrew Snyder; Mary Stewart; Charles David Stewart; Karon Tiger; Thelma Lynn Tilman; Durcille Trolinger Gillen; Jo Susan Verspohl; Ronald Verspohl; Carol Waltz; Ronald F. Waltz; Kathleen Watson; Larry Watson; Abby Weinstein; Barry Weinstein; Martha Whitehead; Marlyin Wilson; Vicki Woodard; Tom George; Diedre Zietz; Leonard Eugene Zietz; Bev Henry; Sara Cotton; Sonja McVay; Gary A. Adair; Rebecca L. Adair; Jacquelyn S. Ashcroft; Juleen L. Beckelman; Linda Black; William Black; Mary A. Bonner; Johnsie C. Brown; Juanita L. Brown; Randy L. Brown; Vicki L. Brown; Joseph T. Brown, Jr.; Caroleen A. Bruns; Rebecca J. Bundy; Robert Burroughs; Cynthia Cooper; Beverley C. Davisson; Jason W. Davisson; William A. Davisson; Debra G. Dean; Mary E. Downing; Robert W.

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Ross; Theodora Zes; Jimmie Zimmerman; Ellen Beegel; Rebecca Toso; Sandra Wiggins-Woolf; Jacqueline Taylor; Jacqueline Stock; Delcy Tibbetts; Lisa Spreen; Iva Anderson; Marcia Loss; Freida Welch; Zheindl Lehner; Irene Romero; Sonya Kagan; Lorna Gallegos; Helen Conley; Eleanor Carlos; Maryann Potter; Linda Brown; Arlene Kelly; Patricia Eastman; Rosa de la Rosa; Mary Miller; Loretta Moore; Mary Dominguez; Carma Scott; Susan Hudak; Sandra Jones; Diane Stokes; Carolee Crews; Della Cowles; E. Muense; Joy Lyons; Therese Briggs; Eartha Wright; Helen Hicks; Mary Lou Santino; Lanelle Guerra; Evelyn Benedict; Bernetta Bowlin; Ginger Carter; Debra Newell; Kathleen Kennett; Isabel Price; Yvonne Knickerbocker; Debra Carey; Janet Higgins; Lynn Cooper; Janet King; Dolly Talaga; Kristine Reiter; Nancy Jacobsen; Nancy Gotchy; Nancy Malaun; Karen Graus; Judy Jamerson; Ruth O'Rourke; Mary Bopp; Connie Johnson; Cynthia Slade; Mary Borie; Cynthia Ellington; Gail Strasser; Wanda Hartfield; Mei-Lan Chin; Karen Rush; Mary Kizzie; Luz Martinez; Linda Carr; Gisela Jones; Carol Tedder; Melinda Green; Dorothy Fields; Ann Hicks; Lorna Devereaux; Pat Dahlberg; Susan Kiley; Katherine Grether; Arlene Lopez; Frances Britt; Andrew Grzeskowiak; David Guerra; Alan Loss; Timothy Adams; David Hicks; Elizabeth Susman; Thelma J. Williams; Dorothy Jordan; Cynthia Parker; Donna McDonald; Hurlean Walker; Gypsy Ray; Cleophes Smith; Dora Newton; Jeanette Owens; Barbara Myers; Daphne Manning; Carol Johnson; Danyel Harrell; Eva Green; Jeanie Gray; Helen Garrison; Shirley Dumas; Elizabeth Stranger; Candy Stoner; Virginia Stickly; Linda Sowle; Jocelyn Snyder; Dorri Raskin; Eva D. Green; Teresa Costas; Annette Cohen; Peri L. Smith; Tamme T. King; Melanie Bush; Margaret Harrigan; Joanne Harenburg; Karen Hamilton; Juanita Hamilton; Theolia Hall; Mittie Lewis Green; Linda Gartman; Susan Gallo; Denise Foster; Jennifer F. Fonterot; Jacqueline Fleming; Kim Felix; Ila Dull; Kathleen M. Donnelly; Stephanie F. Doane; Melonise Curry; Irene Agboola; Malouise Curry; Jo Cooper;

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